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SUPREME COURT, U.S.
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No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of religious liberty. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

ACLJ attorneys often contend with arguments based upon misreadings of the Establishment Clause of the First Amendment. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting invocation of Establishment Clause as justification for viewpoint-based discrimination against private religious speech). The anomalous taxpayer standing rule fashioned in *Flast v. Cohen*, 392 U.S. 83 (1968), has opened the door to the use of the Establishment Clause as a sword against legitimate government programs or actions with faith-based elements. *See, e.g., American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005) (rejecting federal taxpayer Establishment Clause challenge to AmeriCorps Education Awards Program), *cert. denied*, 126 S. Ct. 1132 (2006); *Christie v. United States*, 31 Fed. Appx. 571 (9th Cir. 2002) (rejecting federal taxpayer Establishment Clause challenge to tax exemptions for religious organizations and to National Motto), *cert. denied*, 538 U.S. 946 (2003); *Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, 212 F.3d 1084 (8th Cir. 2000) (rejecting federal taxpayer Establishment Clause challenge to provisions of

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[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

Balanced Budget Act of 1997 accommodating religious objections of Medicare and Medicaid recipients), *cert. denied*, 532 U.S. 957 (2001); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991) (rejecting federal taxpayer Establishment Clause challenge to certain remedial services to low income students under Title I of Education Consolidation and Improvement Act of 1981); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (rejecting federal taxpayer Establishment Clause challenge to National Motto on money and on official documents).

Moreover, Establishment Clause suits have sometimes sought to restrict, not just government expressions with religious significance, but even the *allowance* by government of *private* religious expression. *See, e.g., Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *vacated*, 530 U.S. 1256 (2000), *reinstated on remand, Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (overturning portion of injunction, issued in Establishment Clause suit, forbidding school officials from *allowing* certain student religious speech).

The ACLJ therefore strongly believes in the need for this Court to police the proper boundaries of Article III standing in Establishment Clause litigation. Whereas the *Flast* decision uniquely and unjustifiably departs from otherwise settled Article III standing doctrine, this Court should reconsider *Flast*.

SUMMARY OF ARGUMENT

Flast v. Cohen, 392 U.S. 83 (1968), represents the predicate for respondents' claim of taxpayer standing in this case. Given that developments in this Court's Article III standing jurisprudence have left *Flast* as an isolated and indefensible aberration, this Court should reconsider and overrule *Flast*.

Flast is an anomaly; in no other area of the law has this Court recognized standing for federal taxpayers *qua* taxpayers. In addition, the standing rule which *Flast* fashioned lacks a logical connection to the rationale *Flast* offered for its decision. Importantly, in its decisions since *Flast*, this Court has repudiated each and every argument the *Flast* Court made in support of its decision.

Standing limitations reflect the constitutional borders of Article III and thus serve to maintain the proper separation of powers under the Constitution. *Flast* is therefore not just a quirk in the law, but an unconstitutional breach of these crucial borders. This Court should overrule *Flast v. Cohen.*

ARGUMENT

Respondents' alleged standing in this case rests upon their status as federal taxpayers. This case therefore presents an opportunity to reexamine the sufficiency of taxpayer standing in Establishment Clause cases.

The general rule is that being a taxpayer does *not* by itself suffice to confer Article III standing to challenge federal government actions. *Frothingham v. Mellon*, 262 U.S. 447 (1923). However, in *Flast v. Cohen*, 392 U.S. 83 (1968), this Court created a limited exception for certain claims brought under the Establishment Clause.

As discussed below, this Court's refinement of the doctrine of standing in the years subsequent to *Flast* has completely undermined the rationale for that decision and left *Flast* as an isolated and indefensible departure from otherwise uniform case law. The time is therefore ripe to reconsider the vitality of *Flast.*

I. *FLAST* STANDS ALONE AS AN EXCEPTION TO THE GENERAL RULE THAT BEING A TAXPAYER IS INSUFFICIENT FOR ARTICLE III STANDING.

In *Frothingham*, this Court ruled that federal taxpayer status is insufficient to confer standing to challenge government action.

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.

262 U.S. at 488. While *Flast* subsequently opened up an exception for certain Establishment Clause claims, this Court has countenanced no other exception to the rule of *Frothingham*. On the contrary, this Court has repeatedly *rejected* such pleas of federal taxpayer standing. *See United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864-65 (2006) (no taxpayer standing to sue under Commerce Clause). Even in the context of Establishment Clause claims, this Court has refused to expand *Flast* beyond the contours of that case. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause).

In short, *Flast* stands quite alone.[2]

II. THE *FLAST* RULE IS ILLOGICAL ON ITS OWN TERMS.

The *Flast* decision is not even logically coherent.

The *Flast* Court declared that it would recognize an exception to *Frothingham* when taxpayers could demonstrate "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that statute and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

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[2] To be sure, this Court followed "*Flast* and the narrow exception it created" in *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988). But that case turned on the *scope* of this "narrow exception," and not on its defensibility. *See* 487 U.S. at 618-20.

392 U.S. at 102-03.

But as Justice Harlan pointed out in dissent, the two-part test set forth in *Flast* is "not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.* at 122 (Harlan, J. dissenting). As Justice Harlan explained regarding the first prong of the *Flast* test -- the requirement that the attack be upon a direct expenditure, not just an incidental outlay -- "it surely cannot matter to the taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed . . . as grants-in-aid." *Id.* at 123. The taxpayer's "interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Id.* Justice Harlan perceived the second *Flast* prong -- the requirement that the claim arise under a specific limitation on the spending power -- as "similarly irrelevant." *Id.* "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers." *Id.* As Justice Harlan noted, a plaintiff's interest in the suit does not "vary according to the constitutional provision under which he states his claim." *Id.* at 124.

In sum, *Flast*'s rule does not even follow from its own premises. Furthermore, as demonstrated below, even those premises have failed the test of time.

III. THIS COURT HAS REBUTTED EACH OF THE ARGUMENTS THE *FLAST* COURT RELIED UPON TO CONFER STANDING.

In addition to its internal incoherence, the premises the *Flast* opinion offered in support of its exception to the usual

standing doctrine have been thoroughly undermined by this Court's later decisions, leaving *Flast* with no legs to stand on.

A. This Court Has Expressly Rejected *Flast's* Core Premise.

While the two-part *Flast* test purported to give specific meaning to taxpayer standing doctrine, the lynchpin of the *Flast* Court's analysis came earlier in the opinion. In considering the jurisprudential foundation of Article III standing, the *Flast* Court opined that "the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101 (emphasis added). Referencing this precise passage nearly thirty years later, this Court expressly *rejected* the *Flast* approach. "This would perhaps have seemed like good law at the time of *Flast*, but *our later opinions have made it explicitly clear that Flast erred* in assuming that the assurance of 'serious and adversarial treatment' was the only value protected by standing." *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (emphasis added). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained on the legal process." *Valley Forge*, 454 U.S. at 471.

Thus, this Court has already expressly jettisoned the cornerstone of the *Flast* structure.

B. The Particular Confusion *Flast* Perceived over Constitutional Requirements No Longer Exists.

The *Flast* Court, while acknowledging the *Frothingham* rule against taxpayer standing, professed "confusion" over the difference between the strict requirements of Article III and merely prudential "policy considerations" governing limitations on standing. *Flast*, 392 U.S. at 92-94. *Cf. also id.* at 95-97 (finding uncertainty in meaning and scope of doctrine of justiciability in general); *id.* at 98-99 (describing standing doctrine as complex and vague). The relevant "confusion" no longer exists. After frankly acknowledging that the distinction between constitutional and prudential elements of standing "has not always been clear," *Valley Forge*, 454 U.S. at 471 (citing *Flast*), this Court noted that a subsequent "line of decisions, however, has resolved that ambiguity," at least regarding the "irreducible minimum" requirements of Article III, *Valley Forge*, 454 U.S. at 472.

Thus, it is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible constitutional minimum" of standing, namely, by demonstrating the following three elements:

(1) an "injury in fact" that is "concrete" and "actual or imminent";

(2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,

(3) "redressability -- a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998).[3]

It is now abundantly clear that the want of standing for a federal taxpayer claim flows not from any mere policy choices, but rather from a fundamental constitutional inadequacy. A federal taxpayer claim lacks the necessary elements of a concrete personal injury (as opposed to the same undifferentiated "injury" all citizens and taxpayers suffer from illegal government action[4]), traceability (federal tax funds being

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[3] This Court made clear in *Steel Company* that standing cannot rest upon the fact that a plaintiff "will be gratified by seeing [a defendant] punished for its infraction and that the punishment will deter the risk of future harm." *Id.* at 106-07. To accept such reasoning "would make the redressibility requirement vanish." *Id.* at 107. With respect to the plaintiff's gratification, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* As for deterrence, every adverse ruling will deter a defendant. A "generalized interest in deterrence . . . is insufficient for purposes of Article III." *Id.* at 108-09.

The *Steel Company* Court also held that the mere prospect of an award of costs and attorney fees cannot generate standing. *Id.* at 107-08.

> We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defendant of Wildlife, 504 U.S. 555, 573-74 (1992). *See generally id.* at 574-76 (discussing cases). *Accord Cuno*, 126 S. Ct. at 1862 ("standing has been rejected in [taxpayer] cases because the alleged injury is not concrete and particularized . . . but instead a grievance the taxpayer suffers in some indefinite way in common with people generally . . . . In addition, the injury is not actual or imminent, but instead conjectural or

(continued...)

emptied into a general treasury from which appropriations are drawn), and redressability (since a successful suit would yield neither a tax refund nor any real likelihood of a reduction in the taxpayer's tax bills[5]). "Article III *requires* a demonstration of redressable injury that is *not* satisfied by a claim that tax moneys have been spent unlawfully." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added). *Accord Richardson*; *Schlesinger*; *Cuno*.

C. *Flast* Improperly Disregarded Separation of Powers Concerns.

The *Flast* Court opined that the question of standing to sue "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." 392 U.S. at 100-01.

That proposition is simply no longer tenable. As this Court has repeatedly held, the standing requirements of Article III play a vital role in maintaining the proper separation of powers between the Congress, the Executive, and the Judiciary. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Cuno*, 126 S. Ct. at 1861. "The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101. Indeed, this Court has already expressly declared that "*Flast* erred" when it "failed to

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[4] (...continued)
hypothetical") (internal quotation marks and citations omitted).

[5] "It is pure speculation whether the lawsuit would result in any actual relief for respondents." *Cuno*, 126 S. Ct. at 1863 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality opinion of Kennedy, J.)).

recognize that this doctrine has a separation-of-powers component . . . ." *Lewis*, 518 U.S. at 353 n.3.

D. *Flast's* Reliance on Hypothetical Worst Cases Does Not Support Standing.

The *Flast* Court expressed concern that if taxpayers did not *ipso facto* have standing to bring Establishment Clause claims, then taxpayers could not sue "even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." 392 U.S. at 98 n.17. But this Court has since held that such a concern is legally irrelevant.

The hypothetical downside of a lack of taxpayer standing is by no means unique to Establishment Clause claims. Little imagination is needed to conjure up nightmarish hypothetical violations of the Statement and Account Clause and the Incompatibility Clause, for example, yet there is no taxpayer standing to challenge such violations, *see Richardson; Schlesinger*. One could likewise theorize infringements of a host of other constitutional provisions, such as the Title of Nobility Clause (U.S. Const. Art. I, § 9, cl. 8), for which a taxpayer lawsuit might be the only realistic means of bringing the violations to court. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id.*

E. *Flast* Erred by Conferring Uniquely Privileged Status on Establishment Clause Claims.

The *Flast* Court perceived significance in its view that "one of the specific evils" feared by the drafters of the Establishment Clause "was that the taxing and spending power would be used to favor one religion over another." 392 U.S. at 103. This observation, however, goes to the scope of the Establishment Clause *on the merits*, not to the availability of taxpayer standing. As the Court has since observed, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576-77. And as *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted).

More recently, in *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854 (2006), this Court distinguished *Flast* and referred to its "narrow application in our precedent," 126 S. Ct. at 1865. This Court accurately described *Flast* as having "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion . . . ." 126 S. Ct. at 1865. *See Flast*, 392 U.S. at 106. While *Flast's* description of the relevant injury served to distinguish the case from *Cuno*, it underscores *Flast's* incompatibility with this Court's standing cases. For while

Flast's redefinition of the "injury" may suffice to clear the *redressability* hurdle ("an injunction against the spending would of course redress *that* injury," *Cuno*, 126 S. Ct. at 1865) (emphasis in original)), the injury as defined in *Flast* clearly fails the Article III requirements for a cognizable *injury*. Such an injury is insufficient because that injury "is shared with all members of the public." *Richardson*, 418 U.S. at 178 (internal quotation marks and citation omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

IV. THIS COURT SHOULD OVERRULE *FLAST*.

Flast was problematic from the start. In the years since *Flast*, this Court has knocked out every single rationale underpinning that decision. Like Wile E. Coyote in the old Roadrunner cartoons, *Flast* stands in midair, waiting only for that fact to be noticed before collapsing of its own weight.

If *Flast* were simply an oddity in the law, it might arguably be a tolerable error (though it ought not be), despite the unfairness of privileging only separationist taxpayer lawsuits and despite the manifest inconsistency of *Flast* with the rest of Article III case law. But *Flast* is not just an oddity -- it is an infringement on the Constitution. As demonstrated above, the injury, traceability, and redressibility elements of standing are not mere prudential rules but constitutional *requirements*. *Flast* licenses the *violation* of Article III and the *violation* of the separation of powers under the Constitution. Like the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), *Flast* represents "an

unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (internal quotation marks and citation omitted).

This Court should overrule *Flast v. Cohen*.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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